COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-13

Reply Comments of The Berkshire Gas Company

May 28, 2004

Consistent with the requirements of the Guidelines established pursuant to Service Quality Standards for Electric Distribution Companies and Local Gas Distribution Companies, D.T.E. 98-84 (2001), on March 1, 2004 Berkshire submitted its Service Quality Report for Calendar Year 2003 ("2003 SQ Report") to the Department.[1] Berkshire's 2003 SQ Report demonstrated that Berkshire had satisfied all benchmarks for penalty-related service quality benchmarks in 2003 and, accordingly, was not subject to any penalty established by the Department.[2] In addition, the Company reported that it had enhanced its performance in areas where the Company had not yet developed three years of data in order to establish a penalty standard. In sum, the Company's report demonstrated that Berkshire continues to provide high quality service.

In a notice in this proceeding, dated April 5, 2004, the Department stated that it would accept written comments on the Company's report through 10:00 a.m. on April 24, 2004. A similar process was followed with respect to the Company's 2002 report.

[1] The 2003 SQ Report was submitted in a form consistent with the requirements established within a Memorandum of the Department's Hearing Officers dated February 6, 2003. This memorandum was provided to all Massachusetts gas and electric distribution companies.

[2] The Guidelines had established seven measures where a penalty could be imposed based upon performance in a given year. Potential penalties were established for response time for odor calls, telephone answering rate, service appointments met, on-cycle meter reading, Department Consumer Division cases, billing adjustments and lost work-time accident rates. Other than for odor call response (for which a 95% response standard was established), the Department required that a gas or electric company have at least three years of data prior to establishing a company-specific penalty benchmark.

In a letter dated April 21, 2004, the Attorney General of the Commonwealth (the "Attorney General") submitted comments in this proceeding.[3] In addition, in a letter dated April 27, 2004, Local 12325, United Steelworkers of America, a collective bargaining group for a number of employees of the Company, filed its comments in this docket.[4] The comments of the Attorney General and Local 12325 both make extensive reference to a then-ongoing work stoppage. Indeed, the Attorney General's comments include a series of letters issued in the summer of 2003 from members of the General Court expressing concern with respect to a strike by Local 12325 that continued through a substantial portion of 2003 and stating a general concern that the staffing level requirements of G.L. c. 164, §1E be satisfied.[5] While negotiations were challenging, Berkshire is pleased to report that a mutually satisfactory five-year collective bargaining agreement was ratified by Local 12325 on May 8, 2004.[6] Berkshire looks forward to working with all of its employees, including the valued members of Local 12325, to further its commitment to safe, reliable and high quality service.

These reply comments address, as appropriate, the comments submitted in this docket. As noted, the Attorney General's comments were largely focused on purported questions of service quality and suggested that the Company has somehow failed to

[3] The Attorney General also filed more general comments in the similar dockets established for the consideration of other utility service quality reports that were also incorporated in the Attorney General's comments on the Berkshire filing. See, AG Comments, Att. C.
[4] The 12325 comments indicate that the Hearing Officer had granted an extension for such filing.
[5] Several of these letters may be related to a September 8, 2003 letter from the United Steelworkers of America, Local 12325 regarding staffing levels and that Local 12325 employees had purportedly been "locked-out" by Berkshire. A January 30, 2004 ruling by the NLRB Office of the General Counsel determined that the work stoppage against the Company by the United Steelworkers of America, Local 12325 was an "economic strike."
[6] Berkshire and Local 12325 had reached an agreement in late 2003 for workers to return under the terms of a collective bargaining agreement that had expired in March 31, 2003. Local 12325 employees have been on the job since approximately January 1, 2004.

comply with the requirements of G.L. c. 164, §1. AG Comments, p. 2. The Attorney General encouraged the Department to conduct an investigation, including an opportunity for discovery and evidentiary hearings.[7] The Company notes that the Attorney General's comments in this docket were largely a restatement of his arguments contained in a Motion for Reconsideration filed in D.T.E. 03-11, the docket established to review the Company's 2002 Service Quality Report; in fact, such motion was provided as Attachment A to the AG Comments. The Attorney General also offered several substantive suggestions largely relating to format and presentation. See AG Comments, Att.C.

The Attorney General's Comments suggest that the Company has somehow failed to conform with the requirements of G.L. c. 164, §1 with respect to staffing levels. Section 1E provides that:

> In complying with the service quality standards and employee benchmarks established pursuant to this section, a distribution, transmission or gas company that makes a performance based rate filing after the effective date of this act shall not be allowed to engage in labor displacement or reductions below staffing levels in existence on November 1, 1997, unless such are part of a collective bargaining agreement or agreements between such company and the applicable organization or organizations representing such organizations, or with the approval of the department following an evidentiary hearing at which the burden shall be upon the company to demonstrate that such staffing reductions shall not adversely disrupt service quality standards as established by the department herein.

The Attorney General suggests that the Company is somehow operating with a staffing level below any requirements of Section 1E. In fact, Berkshire has remained in full compliance with the relevant staffing requirements as is described in detail in Appendix

[7] The Company notes that its 2002 Service Quality Report was approved after multiple rounds of discovery issued by the Department and the Attorney General.

A hereto.[8] Berkshire submits that the factors described in Appendix A demonstrate compliance with the requirements of Section 1E and the Company notes that the terms of the recently executed collective bargaining agreement shall govern the relationship between the Company and the workers within Local 12325 on a going forward basis.

Local 12325's comments raise a number of questions that may no longer be relevant given the execution of a new collective bargaining agreement and several others that are well beyond the proper scope of this proceeding. First, Local 12325 incorporates by reference certain statements filed in a complaint dated April 9, 2004 pursuant to G.L. c. 164, §93 by twenty of Berkshire's customers and Local 12325's counsel. This complaint alleges a breach by Berkshire of the requirements of G.L. c. 164, §§1E and 1F. The Company submits that the analysis contained in Appendix A hereto demonstrates the Company's full compliance with the requirements of these sections of the General Laws. Local 12325 next goes on to fault the Company's service quality report for not including a description of several items not, in fact, required by Department rules to be included within such reports. Local 12325 Comments, pp. 2-3. These factors are simply not relevant to this proceeding. Berkshire notes that the Department is free to investigate each allegation contained in Local 12325's complaint but, Berkshire submits, this proceeding is not the appropriate forum. Indeed, "cluttering"

[8] The Attorney General has remained fully aware of the Company's utility staffing levels from, in part, his active intervention in Berkshire's recent base rate proceeding. The Company's analysis in that proceeding provided for the inclusion in rates of the costs of 59.09 union employees in utility rates. This proposal was not challenged by the Attorney General. See The Berkshire Gas Company, D.T.E. 01-56 (2002); The Berkshire Gas Company, D.T.E. 01-56-A, pp. 23-25 (describing salary and benefit allocation factors). The Department established the Company's base rates relying upon such calculation. To now suggest that the Company's utility operations require additional union employees is inconsistent with established precedent. See Boston Gas Company v. Department of Pub. Utils., 367 Mass. 92 (1975) ("A party to a proceeding before a regulatory agency such as the [Department] has a right to expect and obtain reasoned consistency in the agency's decisions.").

the standard service quality review process with a variety of company-specific matters would frustrate and complicate this important process for the entire industry. The Department should proceed with the established service quality review and reject Local 12325's suggestion that this is the appropriate forum to review such matters.[9]

Local 12325 then goes on to raise several other concerns. The first of these issues relate to the implications of a purported "aging" of Berkshire's workforce and then suggests that Berkshire's comprehensive program of "cross-training" employees that results in a more flexible, robust staff for the benefit of customers, is somehow flawed. First, Berkshire seeks to comply with all relevant legal mandates in the area of employment. Berkshire will not discriminate with respect to age in terms of employment. Second, the Company notes that the Department concluded a recent and comprehensive analysis of staffing-related matters in the recent base rate proceeding, D.T.E. 01-56 (2002). In that case, the Company presented substantial evidence with respect to its cross-training program which was implemented to create a more flexible and responsive staff. See, e.g. D.T.E. 01-56, p. 70. As a result of this program, Berkshire believes its Local 12325 employees are now more valuable and flexible. Further, cross-training has been a technique used to retain these valued employees. For example, when an automated meter reading equipment program was completed, most meter readers were re-trained and assigned other primary tasks. Berkshire believes that this program serves the interests of our customers as well as our employees.

[9] Berkshire rejects all of the allegations contained within the comments of Local 12325 with respect to its assertion of any technical violation and expressly reserves its right to respond to such allegations in whatever forum the Department may determine to be appropriate.

Local 12325 next goes on to assert some impropriety in terms of the Company's capital budget. Local 12325 Comments, pp. 3-4. The Company notes that "actual" capital expenditures in 2003 were approximately 92% of the Company's budget. Moreover, Berkshire's 2003 capital budget was actually 90% of its most recent five-year average investment (2003 Budget of $2,366,209 (2003 SQ Report, p. III-12) versus five-year actual expenditure average of $2,622,172 (2003 SQ Report, p. II-12)). The largest variance between budget and actual expenditures relates to D.P.W. projects, an area that the Company simply does not control. In sum, the Company's actual capital expenditures in 2003 were fully in-line with the budget. Finally, the Company notes that its budget process fully addresses all necessary investments for safety and reliability. The Company, however, appropriately preserves greater flexibility for investments associated with adding new customers or new loads.

Lastly, Local 12325 suggests that a slight increase in unaccounted for gas levels may somehow be tied to the Company's capital investment practices. See Local 12325 Comments, p. 4. Berkshire's performance pursuant to this reporting requirement has been extraordinary. While on occasion slightly higher levels have been achieved, Berkshire has averaged 0.45% levels of unaccounted for gas. See 2003 SQ Report, p. II-11. In 2002, Berkshire achieved a level of 0.0% (with rounding). Id. Given this extraordinary low level, it is not surprising that Berkshire experienced an "increase" in 2003. Simply put, there is no legitimate concern with respect to unaccounted for gas at Berkshire.

In sum, Berkshire submits that its 2003 Service Quality Report demonstrates the Company's continuing commitment to responsive, safe and reliable service. Berkshire recognizes and acknowledges the importance of compliance with all requirements of the General Laws and submits that the record in several prior proceedings before the Department confirm that Berkshire has fully complied with the requirements of G.L. c. 164, §1E. Appendix A hereto provides legal support for the Company's compliance with Section 1E. Finally, Berkshire notes that no basis has been raised for any departure from the Department's established practice for reviewing Service Quality Reports. Any process whereby minor, company-specific issues are applied to all utilities may well frustrate the purpose of the Department's established service quality Guidelines.

Accordingly, for all the reasons stated herein and consistent with well-established Department precedent on service quality plan review, The Berkshire Gas Company respectfully submits that the Department should continue its review of the 2003 SQ Report in a manner consistent with that established in D.T.E. 03-11 and find that Berkshire has produced service quality consistent with the Guidelines and Berkshire's approved Service Quality Plan.

APPENDIX A

TO

REPLY COMMENTS OF THE
BERKSHIRE GAS COMPANY
SUMMARY OF COMPLIANCE OF
THE BERKSHIRE GAS COMPANY

A. OVERVIEW

The staffing level requirements of Section 1E of Chapter 164 of the General Laws were not applicable to Berkshire until, at the earliest, July 17, 2001, the date of Berkshire's filing of its performance-based rate plan in docket D.T.E. 01-56. Neither the Attorney General's Comments nor prior filings by the Attorney General (and any other party such as Local 12325) have challenged this clear statutory threshold. Berkshire has fully complied with such requirement since that date because its "utility" union staffing levels are now higher than in November 1997 as well as higher than the levels reflected in utility rates established in early 2002. This factor alone should end any further inquiry into the matter of Berkshire's full compliance with Section 1E. In any event, any union staffing changes made by Berkshire have been generally made pursuant to the Company's collective bargaining agreement (including the most recent agreements negotiated after the enactment of Section 1E). Still further, Berkshire has secured Department approval of certain corporate restructuring associated with the "separation" of non-utility functions. In sum, each of these factors demonstrate Berkshire's full compliance with Section 1E.

B. BERKSHIRE HAS INCREASED UNION EMPLOYMENT FOR ITS REGULATED UTILITY OPERATIONS

Berkshire employees have traditionally been responsible for regulated utility and non-utility functions. Salary and benefit costs have long been allocated between functions pursuant to well-established Department precedent and only the portion of such costs attributable to the utility function based upon actual time spent are reflected in Berkshire's utility rates approved by the Department of Telecommunications and Energy. See, e.g. Berkshire Gas Company, D.P.U. 90-121, p. 59 (1990). Indeed, the evidence presented and accepted in the Company's recent base rate case was that 17.78 of compensation expense was attributable to "non-utility" operations and, therefore, not reflected in utility rates. The Berkshire Gas Company, D.T.E. 01-56, pp. 63-64 (2002). Berkshire's union staffing levels and the portion of such staff properly allocated to the utility function at several relevant dates are shown below:

	Total Union Employees	Employees/Regulatory Work
November 1997	71	59.51
2001 Rate Case Test Year	69	59.09
December 31, 2003	63	63

Sources: Response to Information Request AG-2-1 (D.T.E. 03-11); 2003 SQ Report, Form A, p. 1-2.

Thus, as a practical matter, the Company's union regulated employment levels as reflected in the 2003 SQ Report were higher in 2003 than in November 1997, the relevant date cited in Section 1E in terms of the "staffing" benchmark compliance. Further, the actual 2003 union utility staffing level was also higher than the portion of union staffing properly attributable to the utility function for inclusion in rates. These facts alone support the Department's finding in docket D.T.E. 03-11 that Berkshire was

in compliance with the Department's service quality Guidelines and Berkshire's assertion that it is in full compliance with the requirements of Section 1E.

C. BERKSHIRE'S COLLECTIVE BARGAINING AGREEMENT AUTHORIZED STAFF RESTRUCTURING

Berkshire's collective bargaining agreement had provided full support for the exercise of appropriate management discretion with respect to restructuring its labor force. In the Motion for Reconsideration provided in the Attorney General Comments, the Attorney General acknowledges that staffing levels below 1997 are permissible if authorized by a collective bargaining agreement. AG Comments, Att. A, p.1. The Company does not disagree with this statement and notes that the actual collective bargaining agreement in effect through March 2003 provided in response to an Information Request in D.T.E. 03-11 (Information Request AG-2-7) expressly provided for staff restructuring, including staff reductions.

The Company has long recognized its public service obligation to customers to provide reliable and safe service at the least cost. Accordingly, Berkshire has sought to retain appropriate management discretion to restructure its workforce consistent with its public service obligations. When necessary or appropriate Berkshire has relied upon reassignments, cross-training and attrition when necessary to restructure its work force. This discretion remains critical to ensure the performance of the Company's public service obligations and results in a more flexible and responsive staff.

Article IX of the Company's two most recent collective bargaining agreements retained for the Company the authority necessary to support any staff reductions of the Company. Article IX, entitled "Company Management" provides that:

> Except as limited by the specific provisions of this Agreement, the Company reserves and retains for itself

> exclusively, all of the rights, privileges and authority to manage, operate and to direct the management and operation of its affairs, including, but not limited to, the right to employ, promote, or discharge for cause, the right to assign work, the right to direct working forces, to temporarily transfer employees and to lay off employees because of lack of work. The Union agrees that except insofar as it is granted the right and authority hereunder, it will not hinder or interfere with the management of the Company's affairs.

See Information Request AG-2-7 ("D.T.E. 03-11) (emphasis added) and the attached collective bargaining agreement dated as of April 1, 2000 (passages cited in this Section have been retained in the recently negotiated five-year agreement). These agreements, negotiated after the enactment of Section 1E, reserve substantial discretion to Berkshire's management and binds the union not to interfere with such management affairs. The Attorney General's attempt to refute the substantial discretion negotiated into the agreement fails. The Attorney General's Motion for Reconsideration (AG Comments, Att. A, p. 2) acknowledged the Company's authority to lay off workers, but then strains (without authority and contrary to the agreement's plain intention to not "limit" this provision by reference to examples) to claim that authority to make lay offs does somehow not extend to "permanent" staffing changes. This interpretation is contrary to the plain intent of the parties and can only be supported by a selective reading of the agreements. Article VII, Section 1(c) of the agreements, in fact, demonstrate that the Attorney General's interpretation is flawed as it describes specific procedures that the Company will follow with respect to seniority in "cases of demotion, lay off for lack of work, reduction in the work force or the elimination of a job." The contracts expressly provided for procedures in case the Company elects to exercise its right to reduce the work force as expressly distinguished from layoffs. In sum, the

Attorney General's argument can only be accepted if the plain language of the actual collective bargaining agreements is ignored.

The Attorney General's last argument seems to be that, despite this and other specific reservations of management authority, Section 1E was somehow violated because the relevant collective bargaining agreement did not include some specific verbiage referencing the staffing benchmark. See AG Comments, Att. A, Attachment 1 Steelworkers letter to Rep. Hynes (The letter inaccurately describes the requirements of Section 1E to mean "that the parties have to bargain over safe staffing levels.") The Department should dismiss this previously rejected argument. First, collective bargaining agreements typically reflect the specific negotiating history between the parties whereby the utility and its union are free to structure their agreements as they see fit. Here both parties were aware of the requirements of Section 1E and elected to retain a number of contractual provisions according to Berkshire's substantial discretion in structuring its operations.[10] The Department should be reluctant to alter the agreed-upon intentions of such parties. Indeed, the Department should be wary of a course that requires exhaustive review of collective bargaining agreements, a task relatively far afield from its traditional role.[11] Second, the Department should not hold that Section 1E somehow incorporates such a requirement that a specific provision ought to be included within a collective bargaining agreement to preserve management discretion.

[10] The Company is not aware of other collective bargaining agreements involving Massachusetts gas or electric companies that include provisions referencing Section 1E.

[11] The Department has recognized this same point in response to certain arguments raised by a labor group in D.T.E. 99-84-B. In a motion for clarification, the Utility Workers Union of America ("UWUA") requested that the Department include specific provisions within the Guidelines in the event that a collective bargaining agreement did not specifically mention Section 1E. Id. at 11 - 12. The Department appropriately denied that motion and confirmed that this issue would be determined on a case-by-case basis. Id. at 12-13.

No such requirement is included within Section 1E. In fact, when the General Court has determined that specific language should be included in an agreement with a utility, it has expressly so provided. Cf. G.L. c. 164, §94B (long-term utility contracts for services from affiliates are void unless either approved by the Department or such contracts "include a provision subjecting compensation to be paid thereunder to review and determination" in a rate case (emphasis added)). The General Court did not mandate such a provision in Section 1E and the Department should not rewrite this section by accepting the Attorney General's argument.

D. BERKSHIRE'S CORPORATE RESTRUCTURING HAS BEEN REVIEWED BY THE DEPARTMENT IN TERMS OF SERVICE QUALITY

In November 1997, Berkshire operated as a single entity. Berkshire had no affiliates and its common shares were publicly traded. Berkshire engaged in several non-regulated businesses through "divisions" within the Company.

In response to initiatives from the Department and the General Court with respect to the merits of greater "legal" separation between public utilities such as Berkshire and competitive "affiliates," on June 23, 1998, after the enactment of Section 1E, Berkshire petitioned the Department for approval of a "Reorganization Plan." See The Berkshire Gas Company, D.T.E. 98-61/87 (1998). The Reorganization Plan provided for the establishment of a new holding company (Berkshire Energy Resources) to directly own the common stock of Berkshire. Berkshire also proposed that its "retail propane operations and energy marketing activities . . . [then] performed through divisions of Berkshire, . . . be transferred to new subsidiaries [of Berkshire Energy Resources]." Id. at 4. An evidentiary hearing on this request was held on September 29, 1998. Id. at 2.

The Department reviewed the Reorganization Plan pursuant to the "public interest" standard of G.L. c. 164, §96, including the factors set forth in Mergers and Acquisitions, D.T.E. 93-167-A (1994). One such factor expressly examined by the Department was the effect of the Reorganization Plan on service quality. Id. at 2, 11-12. Berkshire presented substantial evidence that its regulated utility operation was to be "central" to the new holding company and that the Company would "continue its commitment to customer service and relevant operating and safety requirements." Id. at 11. Berkshire explained that the reorganization would not adversely affect quality of service. Indeed, Berkshire explained that the Reorganization Plan might actually enhance service quality by avoiding the prospect of "the diversion of the regulated utility's resources" to unregulated business resulting in a degradation of service quality. Id. Berkshire also presented testimony as to its continuing incentive to maintain high standards in its service quality, including the requirements of performance based rates.

In approving the Reorganization Plan and the related transfer of operations away from Berkshire to non-regulated affiliates, the Department found that its authority pursuant to G.L. c. 164, §93 provided "adequate protection from degradation in the quality of service of Berkshire." Id. at 12. The Department went on to the note the expected (and subsequently implemented) monitoring of quality of service under performance-based ratemaking "will protect customers from a degradation in the quality of service." Berkshire notes that the strong performance reflected in its 2003 SQ Report demonstrates its longstanding commitment to safe and reliable service.

In sum, the Department's express findings in D.T.E. 98-61/87 fully satisfy the requirements of Section 1E with respect to any employee restructuring associated with

the reorganization of non-regulated operations such as retail propane and services. The Department expressly approved the transfer of these operations to non-regulated affiliates "following an evidentiary hearing" and after finding that the Reorganization Plan would not degrade service quality. Accordingly, the Company would be proper in also relying upon this decision in confirming its compliance with the requirements of Section 1E at least with respect to any staffing changes associated with the Reorganization Plan.

E. CONCLUSION

Berkshire has demonstrated that its union regulated utility staffing levels are higher than both the November 1997 date referenced in Section 1E and the date of its "test year" applied in determining utility staffing levels in the Company's recent rate case. These facts alone are sufficient to determine Berkshire's compliance with Section 1E and for the Department to find that there is no need to revise the established procedures for reviewing service quality reports. Nevertheless, beyond this factor, Berkshire may properly rely upon the substantial flexibility provided within its previous and most recent collective bargaining agreements in terms of any restructuring of its work force. Finally, Berkshire may, if necessary, rely upon the extensive review of its corporate restructuring undertaken in 1998 in connection with the corporate separation of its non-utility businesses. In sum, these additional bases provide justification for prior union staff reductions or staff restructurings undertaken by Berkshire in the future that reduce Company union staffing and demonstrate that, in the event of such a change, Berkshire will remain in full compliance with the requirements of Section 1E.